No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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The briefs filed on behalf of respondent and the intervener contain several assertions to which reply should be made.

1. Both respondent and the intervener rely extensively (Resp. Brief, pp. 2–3, 19–20, 29, 33–36; Int. Brief, pp. 2, 6–8, 14) upon a stipulation entered into at the hearing by counsel for the parties (R. 75–77). The stipulation provided that "the following is the evidence which will be submitted without contradiction for the intervener * * *"

(R. 75). Emphasizing the phrase "without contradiction" (Resp. Brief, pp. 2, 3, 19; Int. Brief, pp. 2, 8), respondent and the intervener construe the stipulation as an agreement by the Board to certain propositions of fact, and level against the Board the serious charge of repudiating this agreement.

Neither respondent nor intervener refers to the extensive colloquy explaining the stipulation which took place at the time it was read into the record. This colloquy was not included in the record printed in this Court, but appears at pages 1063 to 1066 of the typewritten transcript on file with the clerk and is set forth in an appendix to this brief.[1] The explanatory colloquy leaves it without question that counsel were not stipulating to facts, but were merely agreeing that the intervener would introduce evidence along the lines set forth in the stipulation; and that the phrase "without contradiction" meant only that intervener's witnesses would not contradict each other but that, on the contrary, "each witness would corroborate the other" (Transcript, p. 1066). Consequently, the stipulation is no more than the customary device to save calling numerous witnesses by agreeing what their testimony would be and that it would

[1] By agreement (R. 237-239), much of the typewritten transcript was not included in the printed record. The Government did not include the explanatory colloquy only because there was no ground for anticipating that an attempt would be made to ascribe to the stipulation the meaning which respondent and intervener now seek to give it.

be uniform. The evidence contained in the stipulation is, of course, entitled to be considered, along with all the other evidence in the record, in determining whether the Board's findings concerning the propriety of the disestablishment remedy are reasonable. We think that the evidence set forth in the stipulation is plainly insufficient to show that the Board's conclusion in that respect was unreasonable because without substantial support upon the entire record.[2]

2. Further, even if, contrary to its real character, the stipulation were one of facts, respondent gives to it, particularly paragraph 3 (R. 76), a construction beyond its true meaning. It interprets paragraph 3 to mean that respondent did not in any way interfere with the employees' freedom of choice of collective bargaining representatives within the meaning of the Act (Resp. Brief, pp. 20, 34). Respondent does not attempt to explain why counsel for all parties should have continued to litigate the issue whether the relations between respondent and the revised Plan violated Section 8 (2) and (1) of the Act, if the Board had agreed that no violation of the Act had occurred. The answer is that this paragraph of the stipulation refers only to the selection, within the Plan's framework, of those of the representatives who were elected by the em-

[2] As we have set forth in our main brief (pp. 18–19), the further question whether the Board's findings that respondent violated the Act are supported by substantial evidence is not before the Court.

ployees; it does not refer to the equivalent number of representatives appointed by respondent prior to June 30, 1937. (See stipulation, par. 11, R. 77.) Paragraphs 2 through 9 dealt exclusively with the election of representatives under the Plan and the evidence referred to in those paragraphs was designed to establish that the elections were free. Accordingly, this paragraph means only that respondent did not exert its influence in favor of or against particular candidates elected by the employees under the Plan. Counsel for intervener apparently so understands the stipulation (Int. Brief, p. 5). The domination, interference, and support found by the Board, accomplished by means other than interference with the elections, as reviewed in our main brief (pp. 18–30), was not a subject of the stipulation. Indeed, counsel for respondent manifested their understanding that this was the meaning of the stipulation in their brief to the court below,[1] and by continuing to try the case after the stipulation was submitted.

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[1] Respondent there argued as follows (p. 32):

"3. How has petitioner *interfered* with the administration of the labor organization whose structure is set forth in the plan? The *answer* is that petitioner has not so interfered.

"The undisputed *testimony* is that at no time has petitioner sought to influence, encourage or discourage the election of any representative (Stipulation, sec. 3: 8, Appendix, 65, 66; Robeson, 60). There is no testimony and the Board has not contended that the company or any employee with, or above the rank of supervisor has ever in any way participated in any elections held under the plan (Stipulation, Sec-

3. Respondent and the intervener attack (Resp. Brief 3–4, 28, 36–38; Int. Brief, pp. 2, 16) the Board's contention that certain data excluded by the Board should not have been considered by the court below (Bd. Main Brief, pp. 51–53) as a "repudiation" of the supplemental certificate filed by the Board. The argument is that the Board, by certifying the data as "a part of the record" (R. 215), waived compliance with its rules and reversed its prior order of exclusion (R. 193–194). The certificate clearly did not have that effect. Its plain purpose was merely that of putting before the court data excluded from evidence before the Board so that the court might determine whether the exclusion was proper. We have not contended that the court should not have considered the data because it was not part of the transcript of record filed in the court below. Our stated position is that the data was correctly excluded by the Board; and that the court below could not properly consider it as evidence in the absence of a motion by respondent to adduce additional evidence before the Board, as the statute requires (Bd. Main Brief, pp. 51–53). This position is, of course, entirely consistent with the Board's supplemental certificate.

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tions 3 and 8, Appendix, 65, 66). Nor is there any testimony that any of the representatives appointed by petitioner pursuant to the 1927 plan ever in any way interfered with the *administration* of the organization. Since the 1937 revision, of course, petitioner is denied representation in the organization."

4. Respondent urges (Brief, pp. 53–54) that the Board's failure to make particular findings concerning evidence adduced at the hearing did not preclude consideration of such evidence by the court below. We do not contend to the contrary. As stated in our main brief (pp. 42, 54), such evidence was open to consideration by the court in determining whether the Board's findings were supported by substantial evidence and whether all essential findings had been made.

5. Respondent's contention (Brief, pp. 81–85) that the court below did not approve the Board's findings that the Act was violated is intelligible only in the light of respondent's repeated assumption (Brief, pp. 25–26, 33, 82–83, 85) that the Act did not become operative until it was held valid by this Court. The court below did not enforce the cease and desist provisions of the Board's order and the requirement that respondent post notices in the plant (R. 235–236) upon the basis "of acts lawful when done but which had ceased after they became unlawful" (Resp. Brief, p. 85); in fact, the court expressly referred to respondent's participation in the Plan which "persisted after the enactment of the statute * * *" (R. 230–231). The revision of June 1937 could not, even had it completely terminated the means whereby respondent's control was effected, either change the fact that for two years respondent had engaged in

practices proscribed by the Act or lessen the need that the effects of such violations be remedied.

Respectfully submitted.

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NOVEMBER 1939.

APPENDIX

The following transpired between the fourth and fifth lines on page 78 of the printed record (typewritten transcript, pp. 1063–1066):

Trial Examiner PARADISE. There is just one question which I have concerning this stipulation. In paragraph 8 you state that the "nominations and elections are by secret ballot and so conducted as to avoid undue influence or interference with voters in any manner whatsoever, and to assure fairness in the counting of ballots."

I presume that you are referring to nominations and elections under the plan as revised June 30, 1937, are you not?

Mr. KEARNEY. All of the Plan—all of it since the Plan has been in force.

Trial Examiner PARADISE. There is some testimony by Mr. Blanton to the contrary.

Mr. KEARNEY. I understood that Mr. Blanton's testimony was that some boy, whom he did not know, told him that the box was opened, or that some people voted on the night shift, which we think is a fact, and that there was nothing at all irregular about it, because, beginning in 1935, they voted from one o'clock until five o'clock, and then made provision for the night shift. We have the tally sheet showing the vote there. We have got the original tally sheet here and can introduce that into evidence to clear up that situation.

Trial Examiner PARADISE. What I am getting at is that it is obvious from his testimony that there was something radically

wrong with the supervision at the polling place, when you could get the vote up to date at any particular time, and decide how many votes you needed, one way or the other, to swing the election.

Mr. KEARNEY. Mr. Bell testified that Mr. Blanton told him that. When Mr. Blanton went on the stand Mr. Blanton testified that some boy had told him something about something that went on; but we are prepared to introduce the tally sheet to show that there was not any irregularity.

Trial Examiner PARADISE. I presume that nothing in this stipulation is intended to counteract or to leave any concession in regard to any testimony thus far given in the case with regard to the Employees' Representative Plan?

Mr. BLUM. Oh, no. I specifically agreed that this would be the evidence introduced by the other side, and the preamble shows that fact.

Mr. KEARNEY. I might say to the Examiner, in order that it might be perfectly clear, (I have not told Mr. Blum this), what I understand the fact in regard to that election was this——

Trial Examiner PARADISE. Let us not go into it. If you have any testimony on it you will have an opportunity to present it.

Mr. KEARNEY. What I was trying to do was to stipulate on that proposition so we could eliminate testimony. If you want it in evidence we can put it in evidence.

Trial Examiner PARADISE. Of course, Mr. Blum has control of the Board's case, and not I. It is up to him to stipulate what he wishes to stipulate, and not to stipulate as to other matters. Frankly, the only reason I raised the point was that in the first para-

graph of the stipulation you inserted the words "without contradiction," which do not appear in the original draft of the stipulation.

Mr. KEARNEY. You notice the word "facts" is in there; that after he raised the objection, 1, 2, 3, 4, down on the 5th line, we struck out "the following are the facts," because the attorney for the Board was not willing to admit that they were the facts——

Trial Examiner PARADISE. That is rather surprising.

Mr. KEARNEY—on stipulation. As to what the facts were, I thought we agreed these were the facts.

Mr. BLUM. They were. The words "without contradiction" gave me the same trouble that they have given you, Mr. Examiner. They also appear in paragraph 13.

I want it specifically understood between counsel and myself that I have agreed, in private, that these words "without contradiction" do not mean that if I were able to put on any rebuttal testimony—that the words "without contradiction" did not apply to that. What they meant by "without contradiction" was that each witness would corroborate the other.

Trial Examiner PARADISE. In other words, "without contradiction" does not mean that no contradiction is to be found from any previous testimony or subsequent testimony given in the case?

Mr. BLUM. That is right.

Trial Examiner PARADISE. All right. Proceed.

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